73-1042

FILED
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MICHAEL RODAK, JR., CLERK

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1973.

NO. A-452

ARTHUR A. LAMBERT,
Petitioner,

v.

MURIEL CLARK, Deputy Clerk, PAULINE C. BERRY, Clerk, and LINCOLN SPENCER, Judge, all of the Superior Court of York County,
Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT

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Respondents

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT

Petitioner prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the First Circuit entered August 17, 1973.

OPINIONS BELOW

There was no formal opinion of the District Court. Excerpt of pp13, and 14 of the transcript in that Court, including judge's statement granting motion to dismiss complaint, and action is printed in Appendix A hereto, and ORDER DISMISSING ACTION with prejudice, which was in effect a summary judgment,is reproduced in Appendix B hereto.

No opinion was rendered by the Court of Appeals; MEMORANDUM AND ORDER dismissing appeal is printed in Appendix C hereto.

JURISDICTION

The judgment of the Court of Appeals (Appendix C, infra), was entered August 17, 1973. On November 7, 1973, Mr. Justice William J. Brennan, Jr., signed an order extending time for filing this petition to an including January 2, 1974. The jurisdiction of the Court is invoked under provisions of 28 U.S.C. §1254(1)

QUESTIONS PRESENTED FOR REVIEW

1. Where person whose property is being plundered and destroyed by repairman claiming exorbitant charges, and threatening exorbitant future storage charges against said property applies to county court clerk for certain blank forms which are pre-requisite, and indispensable to gain access to, and effectuate the processes of, said county court in effort to recover his property, and is denied such blank forms, in turn, by the Deputy Clerk, Clerk, and Clerk and Judge under color of law that such blank forms are available to attorneys only:

a) Can the Deputy Clerk claim judicial immunity in civil rights action pursuant to 42 U.S.C. §1983?

b) Can the Clerk and Deputy Clerk who conspire to effect such denial of said blank forms claim judicial immunity in claim pursuant to 42 U.S.C. §1985?

c) Can county Judge who is approached by

said clerks in the corridors, and ante-rooms of the courthouse, and, who, then and there, having been persuaded by said clerks, does join, and does give support to said conspiracy claim judicial immunity in a civil rights action pursuant 42 U.S.C. §1985?

d) Can county judge who is apprised by said clerks that a conspiracy is afoot to deny equal protection of the law, and who is charged instanter with the inflexible, and uncompromising duty to prevent, or aid to prevent such conspiracy claim judicial immunity in a civil rights action pursuant 42 U.S.C. §1986?

2. Can the Court convert a motion to dismiss into a motion for summary judgment without giving notice to plaintiff of the changed status of the motion so as to give reasonable opportunity to present all material made pertinent to such a motion by Rule 56 of F.R.Civ.P.?

3. Can such a conversion operate to foreclose plaintiff's right to trial by jury?

4. Can the Court make, and act on such

conversion when there are triable issues of fact?

5. Can the trial court base such conversion on the total and complete perversion of facts and law by defendants' attorney at the hearing on motion to dismiss?

CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED

1. Constitutional of Maine, Article I, §§6-A, 19, and 20. Infra D-1, and D-2.

2. Constitution of the United States, Amendments VII, and XIV, § 1. Infra, pp D-2, and D-3

3. Sections 1983, 1985, and 1986 of Title 42 of United States Code.

4. Maine Revised Statutes Annotated, Title 14, §551, West Publishing Co. Infra, p. D-6

STATEMENT OF THE CASE

On January 15. 1973, the petitioner intending to replevy his auto from a garageman who was destroying, and plundering said auto, and

had exorbitant charges, and was threatening more exorbitant charges for storage in future, also to bring fraud action against said garageman, petitioner applied to the Deputy Clerk of York County Superior Court, Alfred, Maine, and in turn to the Clerk, and Clerk and Judge for blank forms of writ of Replevin and Bond, and blank summons which bond petitioner intended to have filled-out, and signed by his surety so as to present to the Court for approval, and the same with the blank summons, to have stamped by the clerk and given to the officer for service. Said blank forms being obviously pre-required to gaining access to court. That the petitioner was denied said blank forms, in turn, by the Deputy Clerk, Clerk, and Clerk and Judge on the basis that petitioner was not an attorney, although petitioner apprised each in turn that he was acting in pro se to recover his property.

On March 5, 1973, plaintiff (petitioner),

filed civil rights complaint in three counts: 42 U.S.C. §§1983, 1985, and 1986 in the United States District Court, District of Maine, Portland, Maine, which Court had jurisdiction under 28 U.S.C. §§1331, and 1343, and complaint included demand for jury trial.

On March 22, 1973, defendants each filed an identical motion to dismiss the complaint, which motions failed to particularize, and left plaintiff to guess upon which grounds said motions were based. Merely pieces of paper that raised no issue.

On April 9, 1973, three days before noticed hearing thereon, plaintiff filed, and served STATEMENT IN OPPOSITION to said motions, pointing out the vagueness of said motions.

On April 12, 1973, hearing was had before Hon. Edward T. Gignoux, United States District Judge. At said hearing, although nothing was mentioned about conversion, said motions were converted into motions for summary judgment

with the plaintiff having no knowledge whatsoever of such conversion taking place. Please see Appendix B, infra, ORDER DISMISSING ACTION with prejudice. The only matter outside of the pleadings that was offered in support of said motions to dismiss was a recital by defendants' attorney, Roland A. Cole, York County Attorney, at the invitation of the Court, which recital was a total and complete perversion of facts, and state law. Please see transcript of hearing, pp. 4 to 8, inclusive, Maine Revised Statute Annotated, Title 14, §551, printed infra, D-6, and Appendix A, infra.

On May 2, 1973, Plaintiff filed NOTICE OF APPEAL in United States District Court, District of Maine, Southern Division, pursuant to Rule 4 of the Rules of Appellate Procedure thereby invoking the appellate jurisdiction of the United States Court of Appeals for the First Circuit as of right. Said Circuit Court dismissed Appellant-Plaintiff's (Petitioner), Appeal, and en-

tered MEMORANDUM AND ORDER dismissing on August 17, 1973. Please see Appendix C, infra.

REASONS FOR GRANTING THE WRIT

The Court of Appeals' approval of the District Court's dismissing action with prejudice devitalizes Amendment XIV, and the Civil Rights Act, 42 U.S.C. §1983, 1985, and 1986, and is in sharp conflict with this Court's decisions. Access to the courts of any of the states is the conservative right of all the other rights. Chambers v. Baltimore, etc., R. Co. (1907) 28 S. Ct. 34, 207 U.S. 142, and reiterated by Mr. Justice Black, in the Orders of October Term, 1970, 402 U.S. at page 954. Bradley v. Fisher, 13 Wall (80 U.S.) 335, 352, "when the want of jurisdiction is known to the judge, no excuse is permissible." In Exparte Virginia, 100 U. S. 339, 348, 25 L.Ed 676 (1879), "Whether the act done by him was judicial or not is to be determined by it character, and not by the character of the agent. Whether he was a county

judge or not is of no importance, The duty of selecting jurors might as well have been committed to a private person as to one holding the office of judge." The Court of Appeals is in conflict with decisions of the various circuits. Manning v. Ketcham 58 F.2d 948, 949 (6 Cir.), where a judge was on the bench was liable for conducting an inquisition of a person called by him to take the stand. In Luttrell v. Douglas, 220 F. Supp 278 (1963), Judge ordered $675 deducted from already-posted bail of $3,000 to pay already-appointed public defender who by law could not accept pay. The Court said: "Such illegal conduct can hardly be described as judicial function. Judicial officers may not escape liability for the commission of illegal acts merely by committing them in the courthouse." In Wade v. Bethesda Hospital, 337 F. Supp. 671 (1971), where judge ordered plaintiff to submit to sterilization, he was acting wholly without jurisdiction in

in the matter. The following cases have held likewise, Robichaud v. Ronan 351 F. 2d 533, 537, 538, (9th Cir. 1965), Spires v. Bottorff, 317 F.2d 273 (7th Cir. 1963), Bauers v. Heisel, 361 F.2d 581, 590,591 (3rd Cir. 1966), Lynch v. Johnson, 420 F.2d 818, 820 (6th Cir. 1970), McCray v. Maryland, 456 F.2d 1, 3, 4, (4th Cir. 1972), Delatte v. Genovese, 273 F. Supp. 654, 657, 658.

The Court of Appeals sanctioning the manner in which this petitioner's case was handled in the lower court, that is,the wide departure from the accepted and usual course of judicial proceedings by the District Court, calls for this Court's power of supervision. When the District Court converted the motion to dismiss into a motion for summary judgment without giving notice of such conversion it violated plaintiff's procedural rights, and denied him trial by jury. Costen v. Paulin's Sportwear, Inc.,(C.A. 9th, 1968) 391 F.2d 81, Erlich v. Glasner, (C.A. 9th

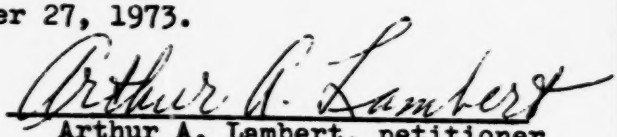
1967) 374 F.2d 681, Georgia S. & F. Ry Co. v. Attlantic Coast Line R.R. Co. (C.A. 5th, 1967) 373 F.2d 493, certiorari denied 88 S.Ct. 69, 389 U.S. 851, 19 L.Ed. 2d 120.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted.

Dated: December 27, 1973.



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Appendix A

EXCERPT OF TRANSCRIPT OF HEARING (pp. 13, and 14, beginning on line 23, page 13)

THE COURT: Well, Gentlemen, quite clearly the defendants are immune from suit of this nature, as the First Circuit has held and a long line of authorities, both previous and since the holding of the First Circuit in Sullivan v. Kelleher. The defendants' motions to dismiss are granted. The action is dismissed. The Court will prepare a brief order which will be filed this afternoon to that effect.

It further appears clearly from what has developed at this hearing that even if the defense of immunity were not available to the defendants, in fact the plaintiff did not follow the perfectly reasonable procedure provided by the Revised Maine Civil Rules which would not have permitted him to obtain the documents which he was seeking and for the denial of which he seeks damage in this action.

Appendix B

UNITED STATES DISTRICT COURT
DISTRICT OF MAINE
SOUTHERN DIVISION

ARTHUR A. LAMBERT, Plaintiff	:	
v.	:	CIVIL NO. 14-16
MURIEL CLARKE, ET AL., Defendants	:	

ORDER DISMISSING ACTION

Hearing having been had this date upon defendants' motions to dismiss the complaint in the above entitled action; and plaintiff having appeared pro se; and defendants having appeared by their counsel, Roland A. Cole, Esquire, and the Court having considered the written and oral arguments of plaintiff and defendants' counsel; for the reasons stated by the Court on the record at said hearing, it is

ORDERED that defendants' motions to dismiss the complaint are GRANTED and the action is DISMISSED with prejudice. Sullivan v. Kelleher, 405 F.2d 486 (1st Cir. 1968) (and cases there cited)

Dated at Portland, Maine, this 12th day of April 1973.

/s/ Edward T. Gignoux
United States District Judge

Appendix C

UNITED STATES COURT OF APPEALS
FOR THE FIRST CIRCUIT

No. 73-1143

ARTHUR A. LAMBERT,
Plaintiff, Appellant

v.

MURIEL CLARK ET AL.,
Defendants, Appellees.

Before COFFIN, Chief Judge,
McENTEE and CAMPBELL, Circuit Judges.

MEMORANDUM AND ORDER

Entered: August 17, 1973

We have examined the briefs of the parties and the record. The issues raised on appeal from the order of the district court are patently without merit. Pursuant to our local Rule 12, the appeal is hereby dismissed.

By the Court:

/s/ Dana H. Gallup

Clerk.

Appendix D

Constitution of Maine, Article I,

§6-A Discrimination prohibited

No person shall be deprived of life, liberty or property without due process of law, nor be denied the equal protection of the laws, nor be denied the enjoyment of his civil rights or be discriminated against in the exercise thereof.

§19 Right of redress for injuries

Every person, for an injury done him in his person, reputation, property or immunities, shall have remedy by due course of law; and right and justice shall be administered freely and without sale, completely and without denial, promptly and without delay.

§20 Trial by jury

In all civil suits, and in all controversies concerning property, the parties shall have a right to trial by jury, except in cases

where it has heretofore been otherwise practiced: the party claiming the right may be heard by himself and his counsel, or either at his election.

Constitution of the United States:

Amendment VII Trial by jury

In suits at common law, where the value in controversy shall exceed twenty dollars, the right of trial by jury shall be preserved, and no fact tried by a jury, shall be otherwise re-examined in any court of the United States, than according to the rules of the common law.

Amendment XIV, §1.

All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the state wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of

citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

42 U.S.C. §1983 Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory, subjects, or causes to be subjected, any citizen if the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, or suit in equity, or other proper proceeding for redress.

42 U.S.C. §1985 (3) If two or more persons in any State or Territory conspire or go in disguise on the highway or on the premises of another, for the purpose of depriving, either

directly or indirectly, any person or class of persons of the equal protection of the laws; or for the purpose of preventing or hindering the constituted authority of any State or Territory from giving or securing to all persons within such State or Territory the equal protection of the laws:...in any case of conspiracy set forth in this section, if one or more persons engaged therein do,or cause to be done, any act in furtherance of the object of such conspiracy, whereby another is injured in his person or property, or deprived of having and exercising any right or privilege of a citizen of the United States, the party so injured or deprived may have an action for the recovery of damages, occasioned by such injury or deprivation, against any one or more of the conspirators.

42 U.S.C. §1986 Every person who, having knowledge that any of the wrongs conspired to

be done, and mentioned in section 1985 of this title, are about to be committed, and having power to prevent or aid in preventing the commission of the same, neglects or refuses so to do, if such wrongful act be committed, shall be liable to the party injured, or his legal representatives, for all damages caused by such wrongful act, which such peeson by reasonable diligence could have prevented; and such damages may be recovered in an action on the case; and any number of persons guilty of such wrongful neglect or refusal may be joined as defendants in the action; and if the death of any party be caused by any such wrongful act and neglect, the legal representatives of the deceased shall have such action therefor, and may recover not exceeding $5,000 damages therein, for the benefit of the widow of the deceased, if there be one, and if there is no widow, then for the benefit of the next of kin of the deceased. But no action under the provisions of

this section shall be sustained which is not commenced within one year after the cause of action has accrued.

Maine Revised Statutes Annotated, Title 14,

§551. Clerks of judicial courts, judges and registers of the probate courts, Judges and clerks of the District Court shall not sell or deliver any blank writs or precepts bearing the seal of said courts and the signature of said judges and registers to any person, except one who has been admitted as an attorney and counselor at law and solicitor and counselor in chancery in accordance with the laws of this State. Said judges and registers of said probate courts shall not receive any paper, petition or other instrument peetaining to the practice of law before said probate courts unless it bears the indorsement of an attorney or counselor at law duly authorized to practice before said courts. The above provisions shall not apply to a party in interest in the subject matter in said courts.

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73-1042

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Respondents.

RESPONDENTS' BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT

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FERNAND R. LaROCHELLE
ASSISTANT ATTORNEY GENERAL
OF COUNSEL

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1973

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RTHUR A. LAMBERT,
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OF COUNSEL

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Statement of the Case. 1

Argument

I. THERE IS NO CONFLICT BETWEEN THE RULE REGARDING JUDICIAL IMMUNITY APPLIED IN THIS CASE AND THE RULE PREVIOUSLY LAID DOWN BY THE UNITED STATES SUPREME COURT IN BRADLEY V. FISHER AND FOLLOWED IN OTHER FEDERAL CIRCUITS. 6

II. THOSE PORTIONS OF THE RECORD WHICH SHOW THAT PETITIONER RECEIVED RESPONDENTS' MOTIONS TO DISMISS AND SUPPORTING CITATIONS TO RELEVANT AUTHORITY SOME THREE WEEKS PRIOR TO THE SCHEDULED HEARING ON THE MOTIONS AND SHOW FURTHER THAT PETITIONER FILED A STATEMENT IN OPPOSITION TO SAID MOTIONS TO DISMISS, CITING AND DISCUSSING CONTRARY AUTHORITY DEMONSTRATE THAT PETITIONER COULD NOT HAVE BEEN SURPRISED BY RESPONDENTS' DEFENSE OF JUDICIAL IMMUNITY. 12

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RULES OF COURT

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QUESTIONS PRESENTED FOR REVIEW

I. Whether the decisions of the District Court and the First Circuit Court of Appeals conflict with the principle of law laid down by the United States Supreme Court in Bradley v. Fisher,[1] when they hold that a judge who acts in a matter over which he has general jurisdiction, is protected from civil liability by the doctrine of judicial immunity.

II. Whether a Petitioner who receives Respondents' Motions to Dismiss containing supporting citations to relevant authority some three weeks prior to the scheduled hearing on the Motions and then files a statement in Opposition to said Motions to Dismiss, citing and discussing contrary authority can plausibly claim that the theory relied on by Respondents and elaborated on by them at the hearing, took him completely by surprise.

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[1] 13 Wall 335 (1872)

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Respondents

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT

STATEMENT OF THE CASE

This is a Petition for Writ of Certiorari. On March 5, 1973, Petitioner filed a complaint in the United States District Court, District of Maine Southern Division, alleging inter alia that Respondents unlawfully refused to

supply him with blank forms of Replevin Writ and Bond, and blank forms of Summons. On March 22 and 23, 1973, Respondents filed Motions to Dismiss the Complaint on the grounds that the District Court lacked jurisdiction of the subject matter and that the complaint failed to state a claim against the Defendants upon which relief could be granted, citing pertinent authority therefor. On April 9, 1973, Petitioner filed a Motion in Opposition to these Motions and a Statement of Points and Authorities in support thereof discussing the defense of judicial immunity (Appendix H). On April 12, 1973, hearing was had in District Court on Defendants' Motions. At the hearing, the attorney for the Defendants stated that the Motions should be granted as to all Defendants because of the doctrine of judicial immunity. He pointed out that Maine law prohibited judges and others from giving or selling certain blank forms to anyone not an attorney or"party in interest"to an

action, adding that Maine law governing the institution of Replevin actions requires that a Plaintiff begin such an action by filing a complaint with the Court. Since Petitioner's complaint in Federal District Court did not allege that Petitioner had so filed a complaint in the State Court, thus making himself a"party in interest" before asking for the Replevin forms, and the hearing demonstrated that in fact he had never filed a complaint in the State Court, (see transcript of hearing in District Court), Defendants' counsel argued that Judge Spencer, who was acting in a matter over which he had general jurisdiction as judge of the Superior Court, acted in accordance with Maine law in refusing Petitioner's request, and as such he was protected by the doctrine of judicial immunity (see Appendix D-G).

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he District Court dismissed Petitioner's omplaint with prejudice. On Appeal to the irst Circuit, the Petitioner's contentions ere dismissed as being patently without erit.

At this time, Respondent would advise he Court he has noted that the Petitioner's rief in Support of his Petition for Writ f Certiorari contains one significant rror in Appendix A thereof. The Appendix uotes in pertinent part the following xcerpt from the transcript of the hearing n District Court:

> ". . .the plaintiff did not follow the perfectly reasonable procedure provided by the Revised Maine Civil Rules which would <u>not</u> have permitted him to obtain the documents which he was seeking. . ." Appendix A of Petitioner's Brief for Writ of Certiorari (emphasis supplied).

he word <u>not</u> which Respondent has underlined oes not appear in the transcript of that earing. Rather the transcript reads:

". . .the plaintiff did not follow the perfectly reasonable procedure provided by the Revised Maine Civil Rules which would have permitted him to obtain the documents which he was seeking. . ."

ARGUMENT

I. THERE IS NO CONFLICT BETWEEN THE RULE REGARDING JUDICIAL IMMUNITY APPLIED IN THIS CASE AND THE RULE PREVIOUSLY LAID DOWN BY THE UNITED STATES SUPREME COURT IN BRADLEY V. FISHER[2] AND FOLLOWED IN OTHER FEDERAL CIRCUITS.

The well established rule regarding judicial immunity which is followed in all Circuits, including the First Circuit, is that for obvious reasons of policy, judicial immunity protects a judge who acts in an area over which he has jurisdiction,either general or specific,and even in an area over which he may only arguably have jurisdiction to act; but it does not protect a judge where it is clear he has acted on a matter over which he had absolutely no jurisdiction to act. As the Court said in Bradley supra:

> "A distinction must be here observed between excess of jurisdiction and the clear absence of all jurisdiction over the subject matter. . ." p. 351.

---

[2] 13 Wall 335 (1872)

Petitioner's cases make the same point.

For example, in Manning v. Ketcham, 58 F.2d 948, the Court said at page 949:

> "When a judge acts in the clear absence of all jurisdiction, i.e. of authority to act officially over the subject matter in hand, . . .the judge has lost his judicial function, has become a mere private person. . ." (emphasis added).

In Wade v. Bethesda Hospital, 337 F.S. 671, the Court wrote:

> "There is no statute in Ohio which authorizes a judge to order sterilization for any purpose. Nor has this Court been able to discover any judicial precedent for such an order in the absence of a specific statute. . ."
>
> "Because there was no set of circumstances or conditions under Ohio law which would permit defendant Gary to order Plaintiff to submit to sterilization, the Court determines that defendant Gary acted wholly without jurisdiction in this matter." pp. 673, 674 (emphasis supplied).

In Bauers v. Heisel, 36 F.2d 581, the Court said:

". . .We cannot perceive that the Defendant acted clearly outside his jurisdiction in either matter". p. 591 (emphasis supplied).

In our case the District Court dismissed Petitioner's complaint on the authority of the First Circuit opinion in Sullivan v. Kelleher, 405 F.2d 486 which said:

"For the soundest reasons of policy it has long been established that when a judge has general jurisdiction over the subject matter he is not civilly liable for acts done in the exercise of his judicial function. But this does not mean that judicial immunity hangs upon the determinations of nice questions of jurisdiction which as the Court pointed out in Bradley v. Fisher, at page 352 can be 'some of the most difficult and embarrassing' that a judicial officer may be called upon to decide. The distinction which must be observed is "between excess of jurisdiction and the clear absence of all jurisdiction over the subject matter. . ." P. 487.

Clearly there is no conflict between the principle adopted by the First Circuit in Sullivan and that employed in other Federal Circuits as a result of the rule stated in

Bradley v. Fisher supra. Sullivan supra demonstrates that the First Circuit is also entirely in accord with the United States Supreme Court pronouncements in Bradley supra.

Furthermore, it is settled that the Civil Rights Act does not disturb the traditional doctrine of judicial immunity. Pierson v. Ray, 386 U.S. 547.

The decision in this case turns solely upon its own facts. Briefly stated, the following facts are clear: Judge Spencer as Judge of the Superior Court had general jurisdiction over the matter of Replevin actions. (See Appendix B). The Petitioner alleges he went to the Judge asking for a blank Replevin form. Title 14 M.R.S.A. §551 prohibits judges from selling or delivering certain blank forms to anyone not an attorney or a party in interest. (See Appendix A). Petitioner was not then an attorney nor was he a "party in interest[3]"

[3] See Glovsky v. Maine Realty Bureau, 102 A.113.

because he had not followed Maine procedure that had to be followed to begin Replevin proceedings, i.e. filing a complaint with the Court:

> "A replevin action may be commenced only by filing the complaint with the Court. . ." Rule 64(c), M.R.C.P. as amended Jan. 1, 1973 - See Appendix C for text of amended rule.

Since Judge Spencer had general jurisdiction over the matter and since he was faced with the prohibitory language of 14 M.R.S.A. §551 as well as the unequivocal language of Rule 64(c), he should be able to decide, without fear of incurring liability, that a non-lawyer who has not filed a complaint with the Court as required by the Rule is not entitled under the statute to blank Replevin forms. As the Court noted in Bradley supra at page 351, 352:

> "A distinction must be here observed between excess of jurisdiction and the clear absence of all jurisdiction over the subject matter. . . [W]here jurisdiction over the subject matter, is invested by law in the judge,

> or in the court which he holds, the manner and extent in which the jurisdiction shall be exercised are generally as much questions for his determination as any other questions involved in the case, although upon the correctness of his determination in these particulars the validity of his judgments may depend. . . for these are particulars for his judicial consideration whenever his general jurisdiction over the subject matter is invoked. Indeed some of the most difficult and embarrassing questions which a judicial officer is called upon to determine relate to his jurisdiction [and] . . .the manner in which the jurisdiction shall be exercised." pp. 351, 352.

To underline its point, the Court in Bradley concluded with the following:

> "the Criminal Court. . .erred in not citing the plaintiff, before making the order striking his name from the roll of its attorneys. . .But this erroneous manner in which its jurisdiction was exercised, however it may have affected the validity of the act, did not make the act any less a judicial act; nor did it render the defendant liable to answer in damages. . . as though the Court had proceeded to act without having any jurisdiction whatever. . ." P. 356.

II. THOSE PORTIONS OF THE RECORD WHICH SHOW THAT PETITIONER RECEIVED RESPONDENTS' MOTIONS TO DISMISS AND SUPPORTING CITATIONS TO RELEVANT AUTHORITY SOME THREE WEEKS PRIOR TO THE SCHEDULED HEARING ON THE MOTIONS AND SHOW FURTHER THAT PETITIONER FILED A STATEMENT IN OPPOSITION TO SAID MOTIONS TO DISMISS, CITING AND DISCUSSING CONTRARY AUTHORITY DEMONSTRATE THAT PETITIONER COULD NOT HAVE BEEN SURPRISED BY RESPONDENTS' DEFENSE OF JUDICIAL IMMUNITY.

Petitioner maintains this Court should grant Certiorari to indicate its disapproval of the way in which he was notified of the Respondents' intended theory of defense. The record shows that Respondents filed their Motions on March 22 and 23, 1973. These Motions cited Rule 12(b), Federal Rules of Civil Procedure, stated that Petitioner's complaint failed to state a claim upon which relief could be granted and cited two cases[4] in support of their contention. Hearing was had on these Motions on April 12, 1973, some three weeks

[4] Sullivan v. Kelleher supra, Westberry v. Fisher, 309 F.S. 12 (1970).

after Respondents' Motions were filed.

Meanwhile, on April 9, 1973, Petitioner filed a statement in opposition to Respondents' Motion to Dismiss. Along with this, he filed a statement of points and authorities discussing the issue of judicial immunity (see Appendix H) citing five cases both state and federal to support his contentions that the defense of judicial immunity was not appropriate in this instance. In spite of this he argued to the First Circuit and argues now to this Court that he was taken completely by surprise by Respondents' theory of defense. On this issue the record speaks for itself.

CONCLUSION

For the reasons stated above, this Court should not grant Certiorari in this matter.

APPENDIX

APPENDIX A

Title 14, Maine Revised Statutes Annotated, Section 551

"Clerks of judicial courts, judges and registers of the probate courts, Judges and clerks of the District Court shall not sell or deliver any blank writs or precepts bearing the seal of said courts and the signature of said judges and registers to any person, except one who has been admitted as an attorney and counselor at law and solicitor and counselor in chancery in accordance with the laws of this State. Said judges and registers of said probate courts shall not receive any paper, petition or other instrument pertaining to the practice of law before said probate courts unless it bears the indorsement of an attorney or counselor at law duly authorized to practice before said courts. The above provisions shall not apply to a party in interest in the subject matter in said courts."

APPENDIX B

Title 14, Maine Revised Statutes Annotated, Section 7302

"Actions of replevin of goods shall be brought in the division where they are detained. The action may be brought before the District Court, if the value of the goods does not exceed the amount to which the civil jurisdiction of such court is limited. Otherwise the action shall be brought before the Superior Court."

APPENDIX C

Rule 64(c), Maine Rules of Civil Procedure

(c) Same: Service. No writ of replevin shall be executed unless both it and the amount of the replevin bond are approved by order of the court. Except as provided in subdivision (h) of this rule, the order of approval may be entered only after notice to the defendant and hearing and upon a finding by the court that there is a reasonable likelihood that the plaintiff will prevail in the replevin action and that the amount of the replevin bond is twice the reasonable value of the goods and chattels to be replevied.

A replevin action may be commenced only by filing the complaint with the court, together with a motion for approval of the writ of replevin and the amount of the replevin bond. The motion shall be supported by affidavit or affidavits setting forth

specific facts sufficient to warrant the required finding and shall be upon the affiant's own knowledge, information and belief; and, so far as upon information and belief, shall state that he believes this information to be true. Except as provided in subdivision (h) of this rule, the motion and affidavits or affidavits with notice of hearing thereon shall be served upon the defendant in the manner provided in Rule 4 at the same time the summons and complaint are served upon him.

The writ of replevin may be procured in blank from the clerk and shall be filled out by the plaintiff's attorney as provided in subdivision (b) of this rule. The plaintiff's attorney shall deliver to the officer replevying the goods the original writ of replevin upon which to make his return and shall attach thereto the bond required by law and a copy of the writ of replevin and bond for service on the defendant. The officer shall forthwith cause

the goods to be replevied and delivered to the plaintiff. Thereupon the defendant shall be served, in the manner provided in either Rule 4 or Rule 5, with a copy of the writ of replevin and bond, with the officer's endorsement thereon of the date of execution of the writ.

APPENDIX D

Transcript of Hearing Upon Defendants' Motions to Dismiss, Page 4, ll. 11-20

MR. COLE: . . ."Well, in reviewing the law in this matter, your Honor, it appears that a Doctrine of Judicial Immunity extends to all three of the named defendants in their official capacities, and we move that this complaint be dismissed on the face of it. You cannot bring a Civil Rights action under either of the three alleged violations here, three different statutes, because of the Doctrine of Judicial Immunity as set forth in the cases cited in our motion, Sullivan v. Kelleher, and Westberry v. Fisher. I would restrict myself to that discussion as of this time right there, what I have to say."

APPENDIX E

nscript of Hearing Upon Defendants' Motions to Dismiss, Page 5, lines 4-13

"MR. COLE: . . .Under Title 14, M.R.S.A., Subsection 551, the law in Maine is that the Clerks are to furnish forms only to attorneys and counsellors-at-law or to persons who are parties in interest, I believe is how the statute reads.

THE COURT: Right.

MR. COLE: And clearly here there is no party in interest until a complaint has been filed with the Court and nothing in here is alleged that a complaint was ever filed in the Superior Court in York County in any matter involving Mr. Lambert here."

APPENDIX F
Transcript of Hearing Upon Defendants' Motions to Dismiss, Page 5, Lines 20-25, Page 6, Lines 1-5

"MR. COLE: He would file his complaint with the Court Clerk, ask for the forms which would be necessary to follow this through. I would point out to the Court that as of January 1st, 1973, the action which Mr. Lambert asks to proceed under here by the Rules of the Maine Supreme Judicial Court which were promulgated effective January 1st, 1973, is a follow up to the Fuentes case where they changed the Rules in regard to how you proceed under a Writ of Replevin, that you have to do so with the consent of the Judge after filing a complaint and having a motion and none of this was done here and no steps were made to follow this through."

APPENDIX G

anscript of Hearing Upon Defendants' Motions to Dismiss, Page 8, Lines 8-15

"MR. COLE: Right. Now there are certain procedures where an attorney can hold up on the filing of his complaint for a short period of time, but we would argue, your Honor, that when an individual comes in and says 'I want blank forms for this or that', there's no way for the Clerk to tell whether they are a party in interest at all until they have filed a complaint. It would seem to me that the filing of the complaint should be compulsory under those circumstances."

APPENDIX H

Pertinent Portions of Plaintiff's Statement
In Opposition to Respondents' Motion
In District Court
Filed April 9, 1973

UNITED STATES DISTRICT COURT
DISTRICT OF MAINE
SOUTHERN DIVISION

ARTHUR A. LAMBERT, Plaintiff vs. MURIEL CLARK, Deputy Clerk, PAULINE C. BERRY, Clerk, and LINCOLN SPENCER, Judge, all of Superior Court of York County, Defendants.	) Civil No. 14-16)NOTICE OF STATEMENT)AND STATEMENT IN)OPPOSITION TO)DEFENDANTS' MOTION TO)DISMISS, POINTS AND)AUTHORITIES, AND)AFFIDAVIT OF ARTHUR A.)LAMBERT IN SUPPORT)THEREOF; AND AFFIDAVIT) OF SERVICE BY MAIL.

"The statement in the motions that the Court lacks jurisdiction pursuant to the two cases cited therein, Sullivan v. Keleher, and Westberry vs. Fisher implies immunity from liability due to the defendants' being in the exercise of judicial function which is a left-handed attempt at denying the allegations of the complaint without suffering the sanctions for false denials. That the acts were strictly in the course of their performance of ministerial function, or

rather their refusal to perform a strictly ministerial duty, all of which is manifested by the complaint, and which ministerial duty ought to be obvious to both counsel for the defendants, and that immunity is definitely not available to any of the defendants. On that basis plaintiff alleges that said Motions are interposed for delay in flagrant defiance of F.R. Civ. P. 11, and signed with intent to defeat the purpose of this Rule.

II

> "Judge acting in his private capacity as a private citizen and divorcing himself from his judicial duties may cast aside his cloak of immunity." Haldane vs. Chagnon, 345 F.2d 601.

> "In determining whether defendant had been performing any judicial act at the time he allegedly violated this section (i.e. 42 USCA 1985), federal rather than state standard would be applied." Lynch vs. Johnson, CA Ky., (1970), 420 F.2d 818.

The mere fact of calling a judge to do a certain function does not necessarily make that function a judicial act. Southeastern

Greyhound Lines vs. Georgia Public Service Commission, 181 S.E. 834, 840, 181 Ga. 75, 102 ALR 517.

Where the law defines the duty to be performed with such precision and certainty as to leave nothing to the exercise of discretion or judgment the act is ministerial. People ex rel., Clark, 220 N.Y.S. 696. "

CERTIFICATE OF SERVICE

Pursuant to the Rules of the Supreme Court of the United States, the undersigned, counsel of record for the Respondents, on the date below, did deposit a copy of the above Petition for Writ of Certiorari in the United States Post Office at Augusta, Maine, first class postage prepaid, addressed to Petitioner as follows: Mr. Arthur A. Lambert, 247 South Alexandria Avenue, Apartment 102, Los Angeles, California 90004

Dated: January 25, 1974

RICHARD S. COHEN
DEPUTY ATTORNEY GENERAL
STATE HOUSE
AUGUSTA, MAINE 04330